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American v. British Rule: The Impact of *James G. Davis Construction Corp. v. HRGM Corp.* on Fee-Shifting Provisions in the Maryland and D.C. Area

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AMERICAN V. BRITISH RULE: THE IMPACT OF *JAMES G. DAVIS CONSTRUCTION CORP. V. HRGM CORP.* ON FEE-SHIFTING PROVISIONS IN THE MARYLAND AND D.C. AREA

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I. INTRODUCTION

In the United States alone, the legal services industry generated over \$250 billion in revenue in 2013 and is projected to generate \$280 billion in 2018.¹ Individuals, businesses, and governments pay a significant price in attorneys' fees to make themselves whole again or defend from outside claims.² Under the American Rule, win or lose, each party pays its own attorneys' fees.³ However, under the British Rule, the losing party always pays the prevailing party's attorneys' fees.⁴ The United States and Japan are the only countries that follow the American Rule, while the rest of the world follows the British Rule.⁵

1. *Legal Services Industry in the US – Statistics & Findings*, STATISTA, <https://www.statista.com/topics/2137/legal-services-industry-in-the-us/> (last visited Nov. 19, 2018).

2. See Christopher Hill, *Reminder: Construction Litigation is Expensive, Be Sure It's Worth It*, CONSTRUCTION L. MUSINGS – RICHMOND, VA (Aug. 19, 2013), <http://constructionlawva.com/reminder-construction-litigation-expensive-be-sure-its-worth/>.

3. See, e.g., *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 281 (Md. 2008); *St. Luke Evangelical Lutheran Church, Inc. v. Smith*, 568 A.2d 35, 35 (Md. 1990).

4. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 518 (1994); see also Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 337 (2013) (stating that the British Rule may encourage lawsuits by optimistic parties).

5. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651 n.1 (1982) (stating that Japan has many restrictions to the American Rule for the prevailing tort plaintiff).

The United States is one of two countries in the world that does not allow the prevailing party to recover attorneys' fees, although parties in the United States contract out of the American Rule sixty-percent of the time.⁶ These clauses are known as "fee-shifting" provisions and are hotly debated before signing a contract.⁷ Few exceptions apply to the American Rule, but one primary exception — contracting out of the American Rule — will be addressed throughout this comment.⁸

This Comment focuses on fee-shifting provisions in construction contracts and, primarily, on the decision in *James G. Davis Construction Corp. v. HRGM Corp.*⁹ because this case deviates from the foundations of the American Rule.¹⁰ This case became even more important after the decisions in *Hensel Phelps Construction Co. v. Cooper Carry Inc.*¹¹ and *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group Limited Partnership, LLP*.¹² The aforementioned cases establish that when there are two indemnity provisions, one specifying third-party claims and one referring to "any and all claims," the unspecified "any and all" language now includes first-party claims.¹³ However, if a defendant wishes to argue the intent of the contract, ambiguity must be found within the contract.¹⁴ With no ambiguity, it is a simple question of fact, not a question of law, and the fact-finder will make the plain language determination of a contract's meaning.¹⁵

6. Eisenberg & Miller, *supra* note 4, at 328, 332, 353 (stating that parties contract out of the American Rule more than any other dispute clause at a rate of sixty-percent, while parties contract into arbitration about eleven-percent of the time and contract out of a jury trial about twenty-percent of the time).

7. See *id.* at 330–31 (arguing that what a person does when he or she enters a contract sheds light on what public policy should be because entering into a contract is mutually beneficial and would therefore provide the most social welfare, and because people contract out of the American Rule sixty-percent of the time, maybe the American Rule is not necessary); *Fee-Shifting*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. See generally *Nova Research, Inc.*, 952 A.2d at 280 (stating that contract clauses allowing payment of the prevailing party's attorneys' fees are generally valid); *St. Luke Evangelical Lutheran Church, Inc.*, 568 A.2d at 39–40 (noting an exception to the American Rule).

9. 147 A.3d 332 (D.C. 2016).

10. *Id.* at 341 (holding for first-party fee-shifting without explicitly stating first-party in the contract provision).

11. 861 F.3d 267 (D.C. Cir. 2017).

12. 164 A.3d 978 (Md. 2017).

13. See *id.* at 979; *Hensel Phelps Constr. Co.*, 861 F.3d at 269; *James G. Davis Constr. Corp.*, 147 A.3d at 340–41.

14. See *Merriam v. United States*, 107 U.S. 437, 441 (1883) (stating that the contract's plain language controls unless there is ambiguity in the contract).

15. *Wash. Props., Inc. v. Chin, Inc.*, 760 A.2d 546, 548 (D.C. 2000) (stating that

To understand fee-shifting provisions, it is necessary to begin with the basics of contract formation, negotiation, and interpretation.¹⁶ It is also imperative to understand the context in which fee-shifting provisions are applied, in this case, within a Joint Venture Agreement (“JVA”).¹⁷ Although the D.C. Court of Appeals may have departed from traditional indemnity law jurisprudence, it is crucial to grasp the precedent to understand where courts may go in the future.¹⁸ Finally, in the shadow of *James G. Davis Construction Corp.*, Maryland and D.C. ruled on subsequent cases: *Bainbridge St. Elmo Bethesda Apartments, LLC* and *Hensel Phelps Construction Co.*, portraying that it may not be necessary to explicitly state first-party claims in an indemnity provision to allow for first-party recovery.¹⁹ Therefore, these three cases together provide guidance on indemnity law within Maryland and D.C.

II. FROM FORMATION TO JUDGMENT

A contract’s creation, negotiation, performance, and conclusion are all equally important.²⁰ This section provides foundational elements of contract formation, contract interpretation by courts, JVAs, and indemnity and fee-shifting provisions. It also reviews the relevant Maryland and D.C. case law in the area of fee-shifting.

A. Formation of a Contract

To create a legally binding contract, there must be an offer, consideration, and acceptance of the offer.²¹ An offer is defined as a manifestation of intent

whether a contract is ambiguous is a question of law and the determination is outside that of a jury).

16. *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 283 (Md. 2008) (stating that the plain meaning of a contract is preferred to the court attempting to determine the intent of the parties).

17. *See James G. Davis Constr. Corp.*, 147 A.3d at 341 (stating that under a joint venture agreement parties wish to shift risk and attorney fee-shifting is part of the shifting of risk).

18. *See id.* at 334 (allowing first-party indemnification even though it was not explicitly called for in the contract).

19. *See Hensel Phelps Constr. Co. v. Cooper Carry Inc.*, 861 F.3d 267, 269 (D.C. Cir. 2017); *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. L.P.*, 164 A.3d 978, 979 (Md. 2017).

20. *Cochran v. Norkunas*, 919 A.2d 700, 708–09 (Md. 2007) (citing *Teachers Ins. & Annuity Ass’n v. Tribune Co.*, 670 F. Supp. 491, 499–503 (S.D.N.Y. 1987)) (holding that all of these components are necessary to avoid an invalid contract).

21. *See id.* at 708; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981) (stating that an offer to the terms of a contract invites the offeree to bind the offeror to the terms stated in the contract); *id.* § 50 (stating that an “[a]cceptance of an

to be bound to the terms of an agreement.²² For valid consideration, the terms of the contract must be bargained for.²³ An acceptance of an offer may be done in any way specified by the offer,²⁴ but there must be mutual assent to the terms of the contract.²⁵

Mutual assent is comprised of two main elements: (1) intent that parties be bound, and (2) the contract terms.²⁶ A contract does not require the intent to be bound to be legally binding, but expressly stating that a contract is not legally binding will prevent the formation of a contract.²⁷ A contract must specify the definiteness of the terms to the contract, meaning a contract must state what each party to the contract is responsible for accomplishing.²⁸ However, if the parties fail to agree on all of the contract's essential terms the contract may be void, especially if the parties did not intend to be bound until all essential terms of the contract were agreed upon.²⁹

B. *Contract Interpretation in Maryland and D.C.*

Courts in Maryland and D.C. apply an objective interpretation to contracts: if no ambiguity exists in the contract, the court will apply the plain meaning of the contractual terms³⁰ and interpret the contract as a reasonably prudent person would.³¹ Ambiguity does not arise because two parties differ on the meaning of a contract or a specific contract provision, but the court must decide whether a term or provision is subject to more than one reasonable interpretation.³² To interpret a contract, courts will look to the

offer is a manifestation of assent to the terms" of the contract).

22. See RESTATEMENT (SECOND) OF CONTRACTS § 24; see *id.* § 24 cmt. a (explaining that an acceptance of the offer will bind with offeree without further action).

23. See *id.* § 71 cmt. c (requiring both parties to benefit from the contract, but not necessarily to the same extent).

24. *Id.* § 30.

25. See *Cochran*, 919 A.2d at 713; see also RESTATEMENT (SECOND) OF CONTRACTS § 18.

26. *Cochran*, 919 A.2d at 708.

27. RESTATEMENT (SECOND) OF CONTRACTS § 21.

28. *Cochran*, 919 A.2d at 708.

29. See *id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 27.

30. *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 283 (Md. 2008) (citing *Diamond Point Plaza L.P. v. Wells Fargo Bank, N.A.*, 929 A.2d 932, 951 (Md. 2007)) (stating that an objective interpretation of contracts applies the plain meaning of the contract terms when no ambiguity exists with the terms); *Rivers & Bryan, Inc. v. HBE Corp.*, 628 A.2d 631, 635 (D.C. 1993).

31. *Cochran*, 919 A.2d at 710 (citing *Walton v. Mariner Health*, 894 A.2d 584, 594 (Md. 2006)).

32. *Diamond Point Plaza L.P.*, 929 A.2d at 952.

words of the contract in its entirety,³³ and the court will not sever any part of the contract unless no other course of action would be sensible.³⁴ Additionally, the court will not look outside the plain language of contract formation without ambiguity.³⁵

If contract language is ambiguous, the courts must determine the intent of the parties.³⁶ A contract is ambiguous if, when looking at the plain language of the contract, a reasonable person could conclude more than one meaning of that contract.³⁷ If determined to be ambiguous, the contract will be interpreted against the drafter.³⁸ Additionally, industry specific and defined terms within a contract are given greater weight in contract interpretation than generic and general language.³⁹ When ambiguity arises, the courts must determine the intent of the parties and to do so, courts may look not only to the terms of the contract, but also to “the subject matter and surrounding circumstances.”⁴⁰

C. Joint Venture Agreements

A JVA is an agreement between two or more parties where the parties combine resources to achieve the terms of the contract.⁴¹ Under the agreement, the total amount of property, money, or skill that is contributed by each party is generally split evenly, but different percentages can be determined by the agreement.⁴² While a party may be contractually required to perform or provide for a certain percentage of a contract, it is impossible to determine the actual amount of property, money, or skill that was provided by a specific party.⁴³ While the duties of an agreement may be divided, each

33. *Nova Research, Inc.*, 952 A.2d at 283.

34. *Sagner v. Glenangus Farms, Inc.*, 198 A.2d 277, 283 (Md. 1964) (explaining that, if a contract provision is illogical or senseless in the context of the entire contract, a court can read out that contract provision).

35. *Dyer v. Bilaal*, 983 A.2d 349, 354–55 (D.C. 2009).

36. *Id.* at 355.

37. *Cochran v. Norkunas*, 919 A.2d 700, 710 (Md. 2007).

38. *Martin & Martin, Inc. v. Bradley Enters., Inc.*, 504 S.E.2d 849, 851 (Va. 1998) (stating that wherever ambiguity arises, it must be interpreted against the drafter of the contract).

39. RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (AM. LAW INST. 1981).

40. *Merriam v. United States*, 107 U.S. 437, 441 (1883) (stating that surrounding circumstances can help shed light on the intent of the parties at the time the contract was entered into).

41. RICHARD W. MILLER, JOINT VENTURES IN CONSTRUCTION 1 (3d ed.) <https://suretyinfo.org/pdf/JointVentures.pdf> (last visited June 12, 2018) (stating that the resources the parties combine may include property, money, skill, or knowledge).

42. *Id.*

43. *Id.*

party to the joint venture is liable for the entirety of the contract; if one party defaults, the other parties must complete the project.⁴⁴

Despite the potential liability arising from JVAs, they come with several advantages.⁴⁵ A JVA allows contractors to spread out risk, combine specialized abilities, and increase bid accuracy.⁴⁶ It may also allow a contractor to bid projects bigger than its capacity, and, most importantly, allow contractors to pool talent, resources, and financing.⁴⁷

Three prominent types of JVAs include an integrated joint venture, non-integrated joint venture, and a combination joint venture.⁴⁸ An integrated joint venture is typically used when the parties involved have a strong relationship and the project is non-linear.⁴⁹ A non-integrated joint venture is typically used where there is a limited relationship between the parties and the work has a definite scope.⁵⁰ Slightly different in its creation, a combination joint venture is used when one party has more property, money, or skill than the other party or parties and where the project is large and complex.⁵¹

D. *Indemnity and Fee-Shifting Provisions*

Indemnity provisions are common in many contracts and shift the liability from one party to another.⁵² Indemnification can generally cover two types of claims: first-party claims and third-party claims.⁵³ A first-party claim involves a claim from a party that is involved with the contract, while a third-party claim involves a party not privy to the base contract between the first

44. *Id.*

45. *Id.*

46. Ms. Kale, V.V. et al., *Joint Venture in Construction Industry*, J. MECHANICAL & CIV. ENGINEERING, 60–61 (2017), [http://www.iosrjournals.org/iosr-jmce/papers/sicete\(civil\)-volume3/36.pdf](http://www.iosrjournals.org/iosr-jmce/papers/sicete(civil)-volume3/36.pdf) (last visited June 12, 2018).

47. *Id.*

48. *See id.* (presenting two other types of JVAs: (1) an equity joint venture where two or more parties create a new corporate entity, each gaining an owning portion of equity; and (2) a contractual joint venture where there is no equity participation between the parties and the agreement is completely governed by contracts).

49. *Id.* at 60.

50. *Id.*

51. *See id.* at 60–61 (stating that a combination joint venture agreement is appropriate when one party is particularly good at a certain aspect of the project and the other party is able to handle the general aspects of the project).

52. *Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 316 (2d Cir. 1985) (“Indemnity obligations, whether imposed by contract or by law, require the indemnitor to hold the indemnitee harmless from costs in connection with a particular class of claims.”).

53. *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 286 (Md. 2008) (citing *Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 316 (2d Cir. 1985)).

parties.⁵⁴ Therefore, a first-party claim involves a claim with someone who has contract privity; while a third-party claimant does not have contract privity with both parties to the original contract.⁵⁵

Fee-shifting provisions, or indemnification, may greatly impact pre-litigation decision-making because of the costs associated with litigation.⁵⁶ Therefore, there are six general theories surrounding fee-shifting provisions.⁵⁷ First, fee-shifting provisions provide fairness through the Rule of Indemnity.⁵⁸ Second, fee-shifting provisions provide compensation for the legal injury or the lawsuit.⁵⁹ Third, fee-shifting can be used punitively.⁶⁰ Fourth, private attorneys generally argue that lawsuits are for the benefit of society as a whole, and it should not matter who bears the cost of attorneys' fees because the lawsuit's outcome benefits the whole.⁶¹ Fifth, involving the relevant strength of the parties involved, deals with cases that have one party with significantly more resources than the other party.⁶² Sixth, the economic incentives theory deals with the decision making process to engage in litigation or settle the suit.⁶³ While there are many theories on fee-shifting provisions, the courts have adopted the American Rule; a policy decision to provide the greatest societal impact by having each party pay its attorneys' fees, unless otherwise provided for by contract.⁶⁴

The two legal rules for fee-shifting provisions and attorney's fees indemnification are the American Rule and the British Rule.⁶⁵ Under the American Rule, the prevailing party may never recover attorneys' fees unless:

54. See *id.* at 287–88.

55. *Id.* (claiming that a subcontractor is one example of a third-party claimant).

56. Rowe, *supra* note 5, at 653.

57. *Id.*

58. *Id.* at 653–54 (claiming that the prevailing party, having been in the right, should not have to pay to fees associated with the lawsuit).

59. *Id.* at 657–58 (stating that making the loser pay the winners attorneys' fees goes to putting the winner in the position they would have been in without the lawsuit).

60. *Id.* at 660 (stating that this fee-shifting is based on unjustifiable or undesirable behavior, and providing the prevailing party with attorneys' fees makes the undesirable behavior more expensive.).

61. *Id.* at 662 (providing that lawsuits that benefit society should be encouraged, and therefore the prevailing party should recover fees for such suits).

62. *Id.* at 663–64 (proposing the idea that leveling the playing field in litigation is sometimes necessary to come to a just outcome).

63. *Id.* at 665–66 (suggesting that economic incentives are necessary to increase or decrease the number of cases that are litigated).

64. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) (stating that parties are generally responsible for their own attorneys' fees).

65. Eisenberg & Miller, *supra* note 4, at 328–29.

(1) [T]he parties to a contract have an agreement to that effect, (2) there is a statute that allows the imposition of such fees, (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against a malicious prosecution.⁶⁶

This is deeply rooted in the common law, and therefore, the United States Supreme Court will not deviate from the American Rule.⁶⁷ However, a court may award attorneys' fees at its discretion, as justice requires.⁶⁸ The American Rule stands in stark contrast to the British Rule.⁶⁹ Under the British Rule the court automatically awards attorneys' fees to the prevailing party.⁷⁰

E. Prior Precedent — Redundant? Maybe Not

On October 6, 2016, in *Bainbridge St. Elmo Bethesda Apartments, LLC*, the D.C. Court of Appeals upheld the trial court's decision that an indemnity provision did not expressly call for the recovery of first-party attorneys' fees, but instead stated the terms "all claims," which the court interpreted to include first-party fees.⁷¹ While the D.C. courts were interpreting Maryland law in *James G. Davis Construction Corp.*, Maryland later adopted D.C.'s *James G. Davis Construction Corp.* holding in *Bainbridge St. Elmo Bethesda LLC* and solidified it as good law.⁷²

66. *St. Luke Evangelical Lutheran Church, Inc. v. Smith*, 568 A.2d 35, 39 (Md. 1990); *see also* *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 281 (Md. 2008) (reinforcing the American Rule applied in *St. Luke Evangelical Lutheran Church, Inc.*).

67. *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 271 (1975) ("[The American Rule] is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.").

68. *Hall v. Cole*, 412 U.S. 1, 5 (1973) (stating that justice may require the awarding of attorneys' fees when opposing party has acted with the purpose of oppression or in bad faith).

69. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 518 (1994) (stating that under the American Rule each party is responsible for their own attorneys' fees while under the British Rule, the prevailing party recovers attorneys' fees).

70. *Id.*

71. *James G. Davis Constr. Corp., v. HRGM Corp.*, 147 A.3d 332, 340 (D.C. 2016).

72. *See Bainbridge St. Elmo Bethesda LLC v. White Flint Exp. Realty Grp. L.P.*, 164 A.3d 978, 979 (Md. 2017) (citing *James G. Davis Constr. Corp., v. HRGM Corp.*, 147 A.3d 332, 340–41) ("[C]oncluding that the plain language of an indemnification provision containing an express reference to attorneys' [sic.] fees and an unqualified reference to any breach, allowed for first-party fee shifting." (internal quotations omitted)).

1. *Atlantic Contracting & Material Co. v. Ulico Casualty Company*

In *Ulico Casualty Company*⁷³ a surety was able to recover first-party attorneys' fees because the court found that, in the context of sureties, it is common practice to recover first-party attorneys' fees. Ulico Casualty Company ("Ulico"), a surety company, issued a performance and surety bond to Atlantic Contracting & Material Company ("Atlantic") guaranteeing Atlantic's performance on a road repair project.⁷⁴ Atlantic failed to pay for equipment repair from Clearwater Hydraulics and Driveshaft Services ("Clearwater"), and Clearwater, together with Ulico, filed a claim for payment.⁷⁵ Ulico filed a claim against Atlantic seeking all costs paid to Clearwater, as well as the attorneys' fees incurred pursuing the indemnification claim against Atlantic.⁷⁶ The indemnification agreement within the performance and surety bond read that Atlantic "indemnif[ied] [Ulico] from and against any and all Loss," and further defined loss to mean "any and all damages, costs, charges, and expenses of any kind" and allowed for the recovery of attorneys' fees.⁷⁷

The Maryland Court of Appeals provided that "it is standard practice for surety companies to require contractors for whom they write bonds to execute indemnity agreements by which principals and their individual backers agree to indemnify sureties against any loss they may incur as a result of writing bonds on behalf of principals."⁷⁸ The court of appeals accepted the trial court's reasoning that "[i]ndemnity agreements of this kind are interpreted generally to *entitle the surety* to recover fees, costs, and expenses incurred in enforcing them."⁷⁹ Therefore, the court found that Ulico was entitled to reasonable attorneys' fees under the language in the indemnification agreement because, in the context of a surety, it would be senseless for a surety to enter into a contract in which the surety lacks the ability to make itself whole if a contractor defaults on the surety bond.⁸⁰

73. 844 A.2d 460 (Md. 2004).

74. *Ulico Cas. Co.*, 844 A.2d at 463; *see also id.* at 468 (stating that "a surety bond is a three-party agreement between a principal obligor, an obligee, and a surety," and that under this agreement a surety guarantees the obligee the performance of the contract if the principal fails to perform).

75. *Id.* at 463.

76. *Id.*

77. *Id.* at 469.

78. *Id.* at 468.

79. *Id.* at 478 (emphasis added).

80. *Id.* at 468, 479.

2. *Nova Research, Inc. v. Penske Truck Leasing Co., L.P.*

Nova Research, Inc. (“Nova Research”) leased a tractor and trailer from Penske Truck Leasing Company (“Penske”).⁸¹ The rental agreement provided that Penske would provide liability insurance to Nova Research.⁸² Nova Research further agreed to “indemnify, and hold harmless Penske, its partners, and their respective agents . . . from and against all loss, liability and expenses caused or arising out of [Nova Research’s] failure to comply with the terms of this Agreement.”⁸³ The agreement further defined loss as “[a]ny and all damages, costs, charges, and expenses of any kind, sustained or incurred by [the indemnified party] in connection with or as a result of: (1) the furnishing of any Bonds; and (2) the enforcement of this Agreement.”⁸⁴

On May 24, 2002, the rented truck was involved in a fatal car accident where both drivers were killed.⁸⁵ Nova Research breached the rental agreement because the person driving the truck was not a registered driver with Penske.⁸⁶ Therefore, Penske filed a claim, enforcing the agreement against Nova Research for all costs associated with the wrongful death claim.⁸⁷ The court held that Penske was not entitled to attorneys’ fees for enforcing the agreement (the first-party claim), but was entitled to attorneys’ fees for defending against the third-party wrongful death action.⁸⁸ The court declined to extend an exception to the American Rule when a contract reads “no express provision for recovering attorney’s fees in a first-party action establishing the right to indemnity.”⁸⁹ Allowing this exception would destroy the American Rule and the British Rule would quickly take over.⁹⁰

81. *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 278 (Md. 2008).

82. *Id.* (stating that the agreement provided that “[Penske] shall, at its sole cost, provide liability protection for Customer and any operator authorized by Penske, and no others. . .”).

83. *Id.* at 279 (explaining that Penske wished to provide insurance up to a certain point, but for Nova Research to indemnify Penske if Nova Research did not comply with the terms of the agreement).

84. *Id.* at 283.

85. *Id.* at 279.

86. *Id.* at 281.

87. *Id.* at 442.

88. *Id.* at 286 (holding that “a contract provision must call for fee recovery expressly for establishing the right to indemnity in order to overcome the application of the American Rule.”).

89. *Id.* at 285 (citing *Jones v. Calvin B. Taylor Banking Co.*, 253 A.2d 742, 748 (Md. 1969)).

90. *Id.* at 285 (“If we were to imply a fee-shifting provision for first party actions, even where the contract does not permit one expressly, the exception would swallow the

F. *The New Wave of Indemnity*

On October 6, 2016, the D.C. Court of Appeals upheld the trial court's decision that an indemnity provision included first-party fees even though it did not expressly call for the recovery of first-party attorneys' fees, but instead included the terms "all claims" which included first-party fees.⁹¹ While the Court in *James G. Davis Construction Corp.* shifted away from the traditional American Rule, the courts in *Bainbridge St. Elmo Bethesda Apartments LLC* and *Hensel Phelps Construction Co.* solidified this shift away from the American Rule.⁹²

1. *James G. Davis Construction Corp. v. HRGM Corp.*

The court in *James G. Davis Construction Corp.* allowed recovery of first-party attorneys' fees when the contract did not specifically call for the recovery of first-party attorneys' fees.⁹³ In August 2002, commercial construction companies James G. Davis Construction Company and HRGM Corporation entered a JVA to renovate McKinley Technical High School.⁹⁴ The agreement was set up as a combination joint venture, with Davis as the managing venturer.⁹⁵ The project was completed in 2006 and was valued at over \$53 million.⁹⁶ HRGM raised several issues about Davis's management of the project and when Davis sent HRGM a letter stating that HRGM owed the joint venture over \$100,000 in unpaid capital contributions, HRGM filed suit "alleging claims for breach of contract, breach of fiduciary duty, and a full and complete accounting."⁹⁷ The trial court found for HRGM.⁹⁸ The issue on appeal was whether the indemnification clauses in the JVA were contradictory, ambiguous or rather expressly stated for the recovery on first-

rule, and the presumption of the American rule disallowing recovery of attorney's fees would, in effect, be gutted.").

91. *James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 334, 340, 342 (D.C. 2016).

92. *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. L.P.*, 164 A.3d 978, 986 n. 6 (Md. 2017); *Hensel Phelps Constr. Co. v. Cooper Carry Inc.*, 861 F.3d 267, 272 (D.C. Cir. 2017).

93. *James G. Davis Constr. Corp.*, 147 A.3d at 334.

94. *Id.*

95. *Id.* at 334 (stating that Davis was responsible for eighty percent of the project and eighty percent of the profits while HRGM was responsible for twenty percent of the project and twenty percent of the profits).

96. *Id.* at 335.

97. *Id.*

98. *See id.* at 335–36 (providing a standard punitive damages jury instruction, which allowed the jury to consider any attorneys' fees that have incurred in the case and which ultimately led the jury to award HRGM \$5,056 in compensatory damages, \$70,500 in punitive damages, \$736,152.76 in attorneys' fees, and \$39,344.67 in costs).

party claims. In a post-trial motion, HRGM requested \$808,692.50 in attorneys' fees and \$75,530.29 in costs based on Article XXI of the JVA.⁹⁹

The two relevant indemnity provision sections were Articles XXI (contested) and XVI (uncontested).¹⁰⁰ Article XVI stated that the parties agreed to indemnify each other for the "loss or losses directly connected with the performance of the Construction Contract."¹⁰¹ Both parties agreed that Article XVI only applied to the third-party claims.¹⁰²

On appeal, the court held that Article XXI extended to first-party claims because of the unqualified language of "any breach" in Article XXI and the language of Article XVI applying only to third-party claims.¹⁰³ The court reasoned that this fact-pattern was more analogous to *Atlantic Contracting & Material Co.* than *Nova Research, Inc. v. Penske Truck Leasing Co.*¹⁰⁴ because (1) Article XXI included broad language; (2) Davis breached the JVA; and (3) the language "any and all" claims was included.¹⁰⁵ Therefore, the court held Davis responsible for the attorneys' fees.¹⁰⁶

The trial court reduced HRGM's attorneys' fee request by \$70,000 because the jury may have considered attorneys' fees in its punitive damages award. The goal in awarding punitive damages was to produce an award that would punish Davis's conduct.¹⁰⁷ Having found no reversible error, the court of appeals held that because the JVA used broad language and a specific third-party only provision, Davis was responsible for the attorneys' fees incurred by HRGM.¹⁰⁸

99. *Id.* at 336.

100. *Id.* at 341.

101. *Id.* at 340.

102. *Id.* at 341.

103. *Id.* at 340–41.

104. *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275 (Md. 2008).

105. *James G. Davis Constr. Corp.*, 147 A.3d at 348; *Nova Research, Inc.*, 952 A.2d at 275 (holding that a defendant may not be responsible for attorneys' fees when the plaintiff is establishing the right to indemnity); *Atl. Contracting & Material Co. v. Ulico Casualty Co.*, 844 A.2d 460, 477 (Md. 2004) (stating that the breaching party may be responsible for attorneys' fees when the breaching party breaches the contract that included a provision for fees).

106. *James G. Davis Constr. Corp.*, 147 A.3d at 348.

107. *Id.* at 337, 339 (stating that Davis contended that the court erred in granting the post-trial motion because the jury considered attorneys' fees in the punitive damages award, and that HRGM was required to prove attorneys' fees as an element of damages and they failed to do so).

108. *Id.* at 340–41, 343, 348.

2. *Hensel Phelps Construction Co. v. Cooper Carry Inc.*

In *Hensel Phelps Construction Co.*, the D.C. Court of Appeals held that, because the JVA's indemnification provision did not specifically address first-party claims, the agreement did not encompass first-party claims.¹⁰⁹ D.C. applies an objective interpretation of a contract and the terms of the contract, if unambiguous, govern the rights of parties.¹¹⁰ Therefore, a contract must be interpreted as a whole — “giving effective meaning to all its terms.”¹¹¹ Specifically, the D.C. Court of Appeals applies a strict construction of indemnification clauses, as to avoid “any obligations which the parties never intended to assume” while still applying an objective interpretation to achieve the parties intent of the contract terms.¹¹²

HQ Hotels acquired all rights and responsibilities from Marriott, and entered into a design build agreement with Hensel Construction, which fully encompassed the original contract between Marriott and Cooper Carry.¹¹³ The relevant fee-shifting provision — which Cooper Carry acknowledged — read:

Marriott may sustain financial loss for which [Cooper Carry] may be liable if the Project or any part thereof is delayed because [Cooper Carry] negligently fail[ed] to perform the Services in accordance with this agreement, including, but not limited to, the Schedule.¹¹⁴

Cooper Carry also agreed to indemnify Marriott (including attorneys' fees) as “a result of, in connection with, or as a consequence of Cooper Carry's performance of the Services under this agreement.”¹¹⁵ Thus, Hensel was assigned the contract.¹¹⁶

The court reasoned that, even though the language of the indemnification provision was broad, it did not specifically include first-party claims or appear to intend first-party claims, and therefore the provision did not expand to first-party claims.¹¹⁷ The court noted the holding in *James G. Davis Construction Corp.*:

109. *Hensel Phelps Constr. Co. v. Cooper Carry Inc.*, 861 F.3d 267, 275 (D.C. Cir. 2017).

110. *Id.*

111. *Id.* (citing *Carlyle Inv. Mgmt. L.L.C. v. Ace Am. Ins. Co.*, 131 A.3d 886, 894–95 (D.C. 2016)).

112. *Am. Bldg. Maint. Co. v. L'Enfant Plaza Props.*, 655 A.2d 858, 861 (D.C. 1995).

113. *Hensel Phelps Constr. Co.*, 861 F.3d at 270–71 (stating that the original contract was converted into a design build contract).

114. *Id.* at 270.

115. *Id.*

116. *Id.* at 270–71.

117. *Id.* at 275.

[R]eading an indemnification clause covering ‘any and all costs and expenses’ to reach first-party claims by looking to a second indemnification clause protecting only against ‘loss or losses directly connected with the performance of the Construction Contract’ and reasoning the parties purposely chose a broader formulation for the clause at issue.¹¹⁸

The court, citing specifically to *James G. Davis Construction Corp.*, adopted *James G. Davis Construction Corp.*’s holding in the state of Maryland.

3. *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group Limited Partnership, LLP*

The Maryland Court of Special Appeals held that the indemnity provision expressly provided for attorneys’ fees in a first-party indemnification action.¹¹⁹ The issue on appeal was whether the court undermined the clarity in *Nova Research* regarding the limited circumstances where a contractual indemnity provision is read as a first-party fee-shifting provision, overriding the American Rule.¹²⁰ The relevant indemnity provision stated:

Bainbridge hereby indemnifies, and agrees to defend and hold harmless White Flint . . . from any and all claims, demands, debts, actions, causes of action, suits, obligations, losses, costs, expense, fees, and liabilities (including reasonable attorney’s fees, disbursements, and litigation costs) arising from or in connection with Bainbridge’s breach of any terms of this Agreement or injuries to persons or property resulting from the Work, or the activities of Bainbridge or its employees, agents, contractors, or affiliates conducted on or about the White Flint Property, including without limitation, for any rent loss directly attributable to any damage to the White Flint Property, caused by the construction of the Project, however Bainbridge shall not be liable for matters resulting from the negligence or intentional misconduct of White Flint, its agents, employees, or contractors. The indemnification obligations set forth herein shall service the termination of this Agreement indefinitely.¹²¹

The circuit court for Montgomery County read this agreement to include first-party claims because the indemnity provision called for specific damages that could only be first-party claims, and, therefore, all first-party

118. *Id.* (citing *James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 340–41 (D.C. 2016)).

119. *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. L.P.*, 164 A.3d 978, 979, 981 (Md. 2017) (relying on the list of claims in the contract that included claims that could only be first-party claims, e.g. rent loss).

120. *Id.* at 984–85; *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 287 (Md. 2008) (holding there is a significant difference between first- and third-party claims and the recovery of attorneys’ fees under each).

121. *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 981.

claims must be included in interpreting the contract.¹²² The court of appeals upheld the court of special appeals' holding and reiterated that this decision does not undermine the clarity provided in *Nova Research* because the indemnity provision in *Bainbridge St. Elmo Bethesda Apartments, LLC* contained express terms whereas the contract in *Nova Research* did not.¹²³ The court in *Bainbridge St. Elmo Bethesda Apartments, LLC* found that the indemnity agreement expressly provided for attorneys' fees and that payment of those fees was tied to the breach of contract.¹²⁴ Therefore, attorneys' fees were paid because there was a breach of contract.¹²⁵

III. THE EXPANSION OF INDEMNITY

The D.C. Court of Appeals, in *James G. Davis Construction Corp.*, misapplied the exceptions to the American Rule that allows the prevailing party to recover attorneys' fees when it is explicitly stated in the contract.¹²⁶ The contract should have been interpreted to only include third-party claims because the indemnity provision did not explicitly call for first-party claims.¹²⁷ To make sure the court does not place an unintended burden on a party, "contractual attorney's fee provisions must be strictly construed to avoid inferring duties that the parties did not intend to create."¹²⁸ A broad interpretation of the provision would go against the well-established public policy that each party is responsible for their own attorneys' fees.¹²⁹ This concept is imperative because if courts begin applying contracts improperly,

122. *Id.* at 982 n. 3.

123. *See id.* at 983; *Nova Research, Inc.*, 952 A.2d at 286–88.

124. *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 986.

125. *Id.* at 983–84.

126. *See Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164–65 (2015); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975); *Nova Research, Inc.*, 952 A.2d at 281 (stating that, under the American Rule, the prevailing party may never recover attorneys' fees unless: "(1) the parties to a contract have an agreement to that effect, (2) there is a statute that allows the imposition of such fees, (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against a malicious prosecution."). *But see James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 336 (D.C. 2016) (awarding first-party attorneys' fees when the contract did not specially state for the recovery of first-party attorneys' fees).

127. *See James G. Davis Constr. Corp.*, 147 A.3d at 336.

128. *Nova Research, Inc.*, 952 A.2d at 287 (citing ROBERT L. ROSSI, ATTORNEYS' FEES § 9:18 (3d ed. 2002, Cum. Supp. 2007) (stating that courts should not put duties into a contract that the parties did not actually intend when the contract was formed); *see also Baker Botts L.L.P.*, 135 S. Ct. at 2171 (2015) (stating that the Supreme Court will not deviate from the American Rule unless there a contract includes a specific and explicit provision agreeing to the British Rule).

129. *See Baker Botts L.L.P.*, 135 S. Ct. at 2164.

or implying unwarranted duties into the contract, the cost of basic goods and services will increase due to the inevitable litigation driven by the courts' inconsistent interpretations of indemnity provisions.¹³⁰ Parties will see an opportunity to either make themselves whole (a valid claim) or gain money or property above and beyond what they are contractually due (an invalid claim).¹³¹

The dispute resolution clause is important because it will likely impact the outcome of a settlement or litigation: “[s]erious consequences may result from a failure to negotiate the dispute resolution provision of a [JVA]. . . .”¹³² Likely, the contractual terms were highly debated prior to signing, and should therefore be given the weight they deserve.¹³³

A. *Modern Cases Applied to Modern Cases: Confusion*

1. *James G. Davis Construction Corp. applied to Hensel Phelps Construction Co. v. Copper Carry and Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint*

The D.C. Court of Appeals held in *James G. Davis Construction Corp.* that a prevailing party will be granted attorneys’ fees, even without expressly calling for first-party fee-shifting, when one indemnity provision calls for awarding attorneys’ fees for “any and all claims” and the other provision specifically calls for fee-shifting in third-party claims.¹³⁴ While this is a limited holding that narrowly fits within the confines of *Nova Research* the court in *James G. Davis Construction Corp.* moved closer to undermining the meaning of the American Rule by allowing first-party recovery even though first-party recovery was not expressly stated in the contract.¹³⁵

The holding in *James G. Davis Construction Corp.*, applied to *Hensel Phelps Construction Co.*, would not allow fee-shifting for a first-party claim because in the Hensel Phelps-Cooper Carry agreement there was only one

130. See, e.g., Eisenberg & Miller, *supra* note 4, at 335–36 (stating that the English rule increases the risk of additional costs to litigants).

131. See *id.* (stating that litigants could work to avoid paying litigation expenses).

132. Ian A. Laird & Randa Adra, *JV Agreements and the Dispute Resolution Clause: 5 Useful Points to Consider*, INSIDE COUNSEL, (Nov. 19, 2014) <https://www.law.com/insidecounsel/2014/11/19/jv-agreements-and-the-dispute-resolution-clause-5/?sreturn=20180008225316>.

133. RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (AM. LAW INST. 1981) (stating that specific and exact terms of a contract are given greater weight than that of general terms).

134. *James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 341 (D.C. 2016) (stating that if the parties wished to only include third-party claims, then the parties should have used the same language from the third-party only provision).

135. See *id.* at 342.

broad fee-shifting provision where Cooper Carry agreed to indemnify Hensel Phelps (including attorneys' fees) from anything in connection with Cooper Carry's performance of the contract.¹³⁶ The court in *Hensel Phelps Construction Co.* reasoned that, even though the indemnification provision was broad, a court could not imply first-party fee-shifting unless it is expressly stated in the contract.¹³⁷ This suggests that the two holdings are in conflict with each other. The court in *Hensel Phelps Construction Co.* further limited the holding in *James G. Davis Construction Corp.* when it stated that:

[A]n indemnification clause covering "any and all costs and expenses" to reach first-party claims by looking to a second indemnification clause protecting only against 'loss or losses directly connected with the performance of the Construction Contract' and reasoning the parties purposely chose a broader formulation for the clause at issue.¹³⁸

In its statement, the court in *Hensel Phelps Construction Co.* suggested that the "any and all" language used in the second indemnification provision in *James G. Davis Construction Corp.*, alone, would not allow for first-party recovery absent a separate indemnification provision that had significantly broader language than the other.¹³⁹

While the contract in *Bainbridge St. Elmo Bethesda Apartments, LLC* provided a list of claims that included first and third-party claims, there was only one indemnification provision.¹⁴⁰ Therefore, the holding in *James G. Davis Construction Corp.* should not apply to *Bainbridge St. Elmo Bethesda Apartments, LLC* because the *Hensel Phelps Construction Co.* court limited the holding to apply only to cases where two indemnification contracts were present in the agreement.¹⁴¹ However, the court in *Bainbridge St. Elmo Bethesda Apartments, LLC* reasoned that the *James G. Davis Construction Corp.* court held that "the plain language of an indemnification provision containing an express reference to 'attorney's fees' and an unqualified reference to 'any breach,'" [sic.] allowed for first-party fee-shifting."¹⁴² Hence, the interpretations of *James G. Davis Construction Corp.* by the courts in *Hensel Phelps Construction Co.* and *Bainbridge St. Elmo Bethesda*

136. See *Hensel Phelps Constr. Co. v. Cooper Carry Inc.*, 861 F.3d 267, 272 (D.C. Cir. 2017).

137. *Id.* at 275.

138. *Id.* (citing *James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 341).

139. *Id.*

140. *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. L.P.*, 164 A.3d 978, 987, 989 (Md. 2017).

141. *Hensel Phelps Constr. Co.*, 861 F.3d at 275 (D.C. Cir. 2017).

142. *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 986 n.6.

Apartments, LLC are conflicting and the meaning of the American Rule is in flux because each of these cases interprets the *James G. Davis Construction Corp.* holding differently.¹⁴³

2. *Hensel Phelps Construction Co. applied to James G. Davis Construction Corp. and Bainbridge St. Elmo Bethesda Apartments, LLC*

The court in *Hensel Phelps Construction Co.*, in declining to expand the scope of the American Rule, interpreted the holding of *James G. Davis Construction Corp.* to mean that when “no clear and unequivocal intent to include first-party claims appears on the face of the instrument . . . [the agreement should be strictly construed].”¹⁴⁴ The court reasoned that, even though the indemnification was broadly constructed, it did not specifically call for first-party claims, and therefore fee-shifting in first-party claims would not be allowed.¹⁴⁵ This holding is clear and is consistent with the jurisprudence regarding indemnity and fee-shifting in the DC-Maryland-Virginia area.¹⁴⁶

Hensel Phelps Construction Co.’s holding, applied to the facts of *James G. Davis Construction Corp.*, would not allow first-party attorneys’ fees.¹⁴⁷ Even with two separate indemnity provisions in *James G. Davis Construction Corp.*, one specifically stated that it only applied to third-party claims and the other indemnity provision did not specifically call for first-party claims.¹⁴⁸ The language of the indemnification provision in *Hensel Phelps Construction Co.* is very similar and as all-inclusive as the indemnification provision at issue in *James G. Davis Construction Corp.*¹⁴⁹ For example, the provision in *Hensel Phelps Construction Co.* included the terms “claim, judgment, lawsuit, damage, liability, and costs and expenses,” which is very similar to the “any and all” language in *James G. Davis Construction Corp.*, yet the court in *Hensel Phelps Construction Co.* did not

143. See *id.* at 987; *Hensel Phelps Constr. Co.*, 861 F.3d at 275.

144. *Hensel Phelps Constr. Co.*, 861 F.3d at 275.

145. See *id.*

146. See *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 282 (Md. 2008) (holding that unless the provision explicitly states first-party and attorneys’ fees, fee-shifting in first-party claims will not be allowed); *Atl. Contracting & Material Co. v. Ulico Cas. Co.*, 844 A.2d 460, 472–73 (Md. 2004) (holding that, in the surety context, indemnification clauses will be interpreted broadly).

147. Compare *Hensel Phelps Constr. Co.*, 861 F.3d at 275, with *James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 341–42 (D.C. 2016).

148. See *James G. Davis Constr. Corp.*, 147 A.3d at 341–42.

149. See *Hensel Phelps Constr. Co.*, 861 F.3d at 275; *James G. Davis Constr. Corp.*, 147 A.3d at 340.

allow for the recovery of attorneys' fees in first-party claims.¹⁵⁰

3. *Hensel Phelps Construction Co. applied to Bainbridge St. Elmo Bethesda Apartments, LLC*

Hensel Phelps Construction Co.'s holding, applied to the facts in *Bainbridge St. Elmo Bethesda Apartments, LLC*, would likely result in a different outcome as well. The indemnity provision in *Bainbridge St. Elmo Bethesda Apartments, LLC* provided "any and all" claims language and listed a series of claims that could both be first and third-party claims, without specifically referencing either first- or third-party claims.¹⁵¹ Therefore, without specific reference to first-party claims, the *Hensel Phelps Construction Co.* court would have not broadened the exceptions to the American Rule and would have found that there should be no fee-shifting allowed in the first-party claim.¹⁵²

The court in *Bainbridge St. Elmo Bethesda Apartments, LLC* held that first-party fee-shifting provisions were included in the provision because it listed both first- and third-party claims, and therefore all first- and third-party claims were covered.¹⁵³ The court further reasoned that because Bainbridge held all the risk, it was necessary for White Flint to be made whole if Bainbridge breached the contract.¹⁵⁴

In applying the holding in *Bainbridge St. Elmo Bethesda Apartments, LLC* to *James G. Davis Construction Corp.*, it is unlikely the outcome would be different because the "any and all" language provided in Article XXI of the *James G. Davis Construction Corp.* contract would allow first- and third-party claims.¹⁵⁵ The rationale in *Bainbridge St. Elmo Bethesda Apartments, LLC* was simply that, because a first-party claim was listed, first-party attorneys' fees were allowed to be recovered regardless of whether the claim was specifically listed.¹⁵⁶ As "any and all" presumably includes first- and third-party claims, the recovery of attorneys' fees in a first-party claim would likely be granted.¹⁵⁷

Similarly, in *Hensel Phelps Construction Co.*, the indemnification

150. Compare *Hensel Phelps Constr. Co.*, 861 F.3d at 270, with *James G. Davis Constr. Corp.*, 147 A.3d at 336.

151. *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. L.P.*, 164 A.3d 978, 981 (Md. 2017).

152. See *Hensel Phelps Constr. Co.*, 861 F.3d at 275 (holding that objective analysis of the indemnification clause led to an interpretation only including third-party claims).

153. *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 987, 989.

154. See *id.* at 986.

155. See *James G. Davis Constr. Corp.*, 147 A.3d at 336.

156. *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 988.

157. *James G. Davis Constr. Corp.*, 147 A.3d at 332, 336.

agreement included broad terms, such as a “claim,” which could be filed by either a first- or third-party.¹⁵⁸ Following the court’s reasoning in *Bainbridge St. Elmo Bethesda Apartments, LLC*, the “claim” would include the recovery of attorneys’ fees in a first-party claim because unqualified claims were covered by the indemnification provisions in the contract.¹⁵⁹ However, if *Bainbridge St. Elmo Bethesda Apartments, LLC*’s holding is read more narrowly — that specific first- and third-party claims were listed, and, therefore, all first- and third-parties could recover attorneys’ fees — then the unqualified claim would likely not include first-party recovery of attorneys’ fees.¹⁶⁰

B. James G. Davis Construction Corp.: Ambiguity between Indemnity Provisions

In *James G. Davis Construction Corp.*, the D.C. Court of Appeals applied Maryland law and, therefore, it was unclear how the Maryland courts would interpret this decision.¹⁶¹ However, the Maryland Court of Appeals cited to *James G. Davis Construction Corp.* in *Bainbridge St. Elmo Bethesda Apartments, LLC*, clarifying Maryland’s interpretation.¹⁶² The court limited the holding in *James G. Davis Construction Corp.* to include only express references to attorneys’ fees and “any and all” language.¹⁶³ Though this clarification provides guidance for future contracts, it does not provide a rationale for deviating from requiring contracting parties to specifically include first-party claims in their fee-shifting provisions.¹⁶⁴

While the court in *James G. Davis Construction Corp.* rejected *Nova Research, Inc.*, one of Maryland’s fundamental cases regarding fee-shifting provisions, the court failed to provide reasoning for not connecting attorneys’ fees to first-party claims when the connection was not specifically stating it in the contract.¹⁶⁵ Furthermore, the court continued to include first-

158. *Hensel Phelps Constr. Co. v. Cooper Carry Inc.*, 861 F.3d 267, 275 (D.C. Cir. 2017).

159. Compare *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 980–81, 989 (stating that the reason for the recovery was the express provisions), with *Hensel Phelps Constr. Co.*, 861 F.3d at 275 (using a traditional interpretation of indemnification clauses to find that only third parties can recover).

160. See *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 989; *Hensel Phelps Constr. Co.*, 861 F.3d at 275.

161. *James G. Davis Constr. Corp.*, 147 A.3d at 340.

162. *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 986 (citing *James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 340–41) (clarifying how Maryland law would interpret the decision).

163. *Id.* at 986 n.6.

164. *Id.*

165. See *James G. Davis Constr. Corp.*, 147 A.3d at 332 (addressing whether or not

party recovery without the JVA expressly stating “first-party” even after it acknowledged that courts have typically erred on the side of caution by not including first-party recovery when it is called into question.¹⁶⁶ The court reasoned that *Nova Research* does not bar the recovery of attorneys’ fees when “attorneys’ fees” are specifically listed in the agreement.¹⁶⁷ However, the court failed to consider the effect of allowing fees recovery in this situation and should not have extended first-party recovery.¹⁶⁸ In allowing the recovery of attorneys’ fees in these types of situations, the court gutted the meaning of the American Rule because the intent to include first-party fees was not expressly stated in the contract.¹⁶⁹

The *James G. Davis Construction Corp.* court’s reasoning is logically sound, but not legally rational; both parties agreed that Article XXI only applied to third-party claims, so the court reasoned that broad language included first-party claims, barring any ambiguity.¹⁷⁰ However, the court failed to apply the precedent and proceeded to allow a new exception to the American Rule.¹⁷¹ The court stated that because Article XVI specifically stated third-party claims and Article XXI listed “any and all claims,” the contract therefore allowed attorneys’ fees recovery for first-party claims.¹⁷² The court further stated that if the parties wanted Article XXI to include only third-party claims, the parties should have used language similar to that in Article XVI, specifically stating third-party recovery.¹⁷³ However, a court cannot infer parties’ intents and grant attorneys’ fees to the prevailing party unless the language is unmistakably clear.¹⁷⁴ At the very least, the court should have rendered Article XXI ambiguous because, without specifically calling for the recovery of attorneys’ fees in first-party claims, the court

first-party fee-shifting can take place without expressly stating for the recovery of attorneys’ fees in the contract).

166. *Id.* at 341–42 (citing *Atl. Contracting & Material Co. v. Ulico Casualty Co.* as the only other case where first-party recovery was allowed without explicitly stated in the contract); *see also* *Atl. Contracting & Material Co. v. Ulico Cas. Co.*, 844 A.2d 460, 469 (Md. 2004) (allowing for a first-party surety to recover fees because in the surety context, contracts are generally interpreted to allow the surety to recover fees and costs).

167. *James G. Davis Constr. Corp.*, 147 A.3d at 341–42.

168. *See id.* at 342 (stating that *Nova Research* did not have the opportunity to address whether first-party fees could be limited if the contract addresses attorneys’ fees in first-party claims).

169. *Id.*

170. *See James G. Davis Constr. Corp.*, 147 A.3d at 341.

171. *See id.* at 345–46; *Nova Research, Inc. v. Penske Truck Leasing Co., L.P.*, 952 A.2d 275, 285 (Md. 2008).

172. *James G. Davis Constr. Corp.*, 147 A.3d at 341.

173. *Id.*

174. *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 199 (2d Cir. 2003).

could not simply imply the intent of the parties. Additionally, the court should have looked to the parties' intent at time of agreement.¹⁷⁵

The court erred in relying on the plain meaning of the contract and finding no ambiguity in Article XXI.¹⁷⁶ However, if ambiguity did exist and a reasonably prudent person could find different meanings in the contract terms, the intent of the contract could have been found in the interest of justice.¹⁷⁷ When ambiguity does exist, the parties' intents are imperative and the circumstances surrounding the agreement must be investigated or the costs of attorneys' fees associated with the suit would fall on one party, even if the parties intended to pay their own attorneys' fees.¹⁷⁸ While the conclusion would likely have been the same because first-party indemnity provisions are usually included in JVs,¹⁷⁹ the rationale would have limited the effect of the holding on current and future contracts in that the court could have limited the holding to the facts of the case.¹⁸⁰

C. *Interpreting a Contract Within the Context of the Industry*

The holding in *James G. Davis Construction Corp.* is analogous to the holding of *Atlantic Contracting*, which allowed the surety to recover fees and costs by a first-party action because "these types of agreements" typically allow recovery, even though "attorneys' fees" were not specifically referred to in the contract when dealing with a surety.¹⁸¹ Similarly, the contract in *James G. Davis Construction Corp.* should be interpreted within

175. *Dyer v. Bilaal*, 983 A.2d 349, 354–55 (D.C. 2009) (stating that a court will not look to the intent of the parties at contract formation unless there is some ambiguity with the contract); *Diamond Point Plaza L.P. v. Wells Fargo Bank, N.A.*, 929 A.2d 932, 952 (Md. 2007) ("A contract is not ambiguous simply because, in litigation, the parties offer different meanings to the language. It is for the court, supposing itself to be that reasonably prudent person, to determine whether the language is susceptible of more than one meaning.").

176. *James G. Davis Constr. Corp.*, 147 A.3d at 341.

177. *Cochran v. Norkunas*, 919 A.2d 700, 709–10 (Md. 2007) (stating that courts will not look to the intent of the parties without ambiguity).

178. *See Merriam v. United States*, 107 U.S. 437, 444 (1883) (holding that contracts should be construed using the contract's language if the contract is ambiguous due to surrounding circumstances); *Martin & Martin, Inc. v. Bradley Enters. Inc.*, 504 S.E.2d 849, 851 (Va. 1998) (stating that wherever ambiguity arises, it must be interpreted against the drafter of the contract so the result may have been the same in *James G. Davis Construction Corp.*).

179. MILLER, *supra* note 41.

180. *See generally James G. Davis Constr. Corp.*, 147 A.3d 332 (providing a broad holding because attorneys' fees were not granted in the interest of justice, but because the court stated the contract expressly provided for attorneys' fees).

181. *Id.*; *Atl. Contracting & Material Co. v. Ulico Cas. Co.*, 844 A.2d 460, 469 (Md. 2004).

the context of the construction industry to truly understand the meaning of the contract and the intent of the parties.¹⁸² Once determined to be ambiguous, the court may look to the surrounding circumstances to determine the intent of the parties.¹⁸³ Under the intent of the parties theory, there are two relevant and prevalent circumstances: (1) this contract is within a JVA and (2) this contract is a JVA within the construction industry.¹⁸⁴

Typically, JVAs include first-party and third-party fee-shifting provisions because one party is jointly and severally liable for all actions taken by the other venturer.¹⁸⁵ However, not every JVA includes first-party and third-party fee-shifting.¹⁸⁶ Additionally, defendants may believe the cost of litigation is the only deterrent to meritless lawsuits and harassment.¹⁸⁷ Therefore, courts generally apply a strict interpretation of indemnity provisions because it is in the best interest of both parties and serves as a deterrence against frivolous claims in the future as the cost associated with the suit may increase or decrease based on the indemnity provision.¹⁸⁸ However, because this contract is a JVA and because Davis was responsible for eighty percent of the profits and potential liability, it is likely that Article XXI could have been explicitly restricted to first-party claims because Davis could have written “first-party” into the contract if that was Davis’

182. *James G. Davis Constr. Corp.*, 147 A.3d at 332.

183. *Merriam*, 107 U.S. at 441 (stating that the court may look to the subject matter and the surrounding circumstances to determine the parties’ intent at the contracts inception).

184. *Pacific Indem. Co. v. Interstate Fire & Cas. Co.*, 488 A.2d 486, 488 (Md. 1985) (stating that courts should looking at the character, the purpose, and the facts and circumstances of the contract at the time of the contract’s execution to determine the intention of the parties).

185. See generally, Vincent Rowan, *Working With a Joint Venture or Consortium Contractor: Getting the Best Out of the Relationship*, REED SMITH (Dec. 13, 2011), <https://www.reedsmith.com/en/perspectives/2011/12/working-with-a-joint-venture-or-consortium-contrac> (providing an overview of typical JVAs and the implications of joint and several liability in such agreements).

186. See MILLER, *supra* note 41.

187. See D. Hull Youngblood, Jr. & Peter N. Flocos, *Forget About Copy and Paste. The Best Indemnification Provisions Start With the Details of the Transaction*, THE PRAC. L., at 24 (Aug. 2010), http://www.klgates.com/files/Publication/4ff23f1-3315-4425-b6ad-56e54bea55f0/Presentation/PublicationAttachment/fba1faaa-91de-4849-8a8f-6678e1cad2b2/Youngblood_Flocos_PracticalLawyer.pdf (“Defendant may perceive that only the cost of litigation stands between the defendant and harassment by a plaintiff asserting meritless claims.”).

188. See *Am. Bldg. Maint. Co. v. L’Enfant Plaza Props.*, 655 A.2d 858, 861 (D.C. 1995) (stating that the D.C. Court of Appeals applies a strict construction of indemnification clauses, as to avoid “any obligations which the parties never intended to assume.”).

intention.¹⁸⁹

Generally, private parties contract out of the American Rule about sixty-percent of the time,¹⁹⁰ which allows a general contractor to reduce the overall risk associated with a construction project.¹⁹¹ The most common indemnity provision used in construction contracts can be found in American Institute of Architects document 201A and “it identifies the contractor as the one responsible for protecting [its] subcontractors, and other parties involve[ed] in the contract, including agent, employees or any other related party against claims, damages, losses, and expenses, including but not limited to attorneys’ fees.”¹⁹² Being that the most popular indemnity provision does not include first-party indemnification, it is not industry standard to include first-party indemnifications in construction contracts.¹⁹³

While JVAs do allow for the combination of resources by two separate companies, a combination JVA presents a unique issue.¹⁹⁴ Having more responsibility over the project, Davis likely wanted as much control as possible to limit its possible liability. At the same time, as HRGM was only receiving twenty-percent of the profit, it would want to limit its liability for such a small profit.¹⁹⁵ Furthermore, because Davis was responsible for eighty-percent of the contract and drafted the contract, it therefore had more negotiating power.¹⁹⁶ If the court found ambiguity within the contract, it

189. *James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 334, 348 (D.C. 2016).

190. *See Eisenberg & Miller*, *supra* note 4, at 331 (adding that parties contract into arbitration about eleven percent of the time and contract out of a jury trial about twenty-percent of the time).

191. *See Juan Rodriguez, Indemnity Clauses in Construction Contracts*, THE BALANCE SMALL BUS. (Oct. 12, 2017), <https://www.thebalance.com/indemnity-agreements-844985> (stating that an indemnity provision allows a contractor to divert the risk of the other first- or third-party claims because if anything were to happen, it would only take time and not additional money to make the company whole again).

192. *Id.* (stating that this provision requires a subcontractor to indemnify the contractor of any and all costs that arise from anything that subcontractor is in control over).

193. *See id.* (providing that the most popular provisions do not include first-party fee-shifting provisions because it is necessary for the parties to craft their own).

194. *See Ms. Kale, V.V. et al.*, *supra* note 46, at 60–61 (stating that a combination joint venture takes place when one party has more money or property and therefore has provides more to the project and in turn receives a larger percentage of the profits and liability); *see also supra* Part IIC.

195. *See James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 334, 348 (D.C. 2016) (declaring that the trial court found that HRGM achieved its business reputation goals).

196. *See id.*

would have been interpreted against Davis as the drafter of the contract.¹⁹⁷ Likely, regardless of the court's holding, the contract would likely have been interpreted against Davis and in favor of HRGM because Davis drafted the contract.¹⁹⁸

While broad language is difficult to maneuver around — for example, the “any and all” language in Article XXI of the JVA — the D.C. Court of Appeals veered away from precedent regarding first-party recovery of attorneys’ fees.¹⁹⁹ While similar to the indemnification provision in *Nova Research*,²⁰⁰ the court in *James G. Davis Construction Corp.* found *Nova Research*’s holding inapplicable because attorneys’ fees were explicitly referred to within Article XXI of the agreement and Article XXI did not specifically call for the recovery of first-party attorneys’ fees.²⁰¹

With *Bainbridge St. Elmo Bethesda Apartments, LLC* clarifying *James G. Davis Construction Corp.*’s holding, the conclusion is not as undefined as it once was; any language indicating “any and all” in reference to claims where attorneys’ fees could be recovered is a death trap for the failing party to a claim because the failing party would be responsible for the oppositions attorneys’ fees.²⁰² Article XXI of the Davis and HRGM Joint Venture Agreement stated: “[e]ach Venturer shall indemnify and save harmless the other Venturer and its affiliates, directors, employees and officers from and against any and all claims . . . (including but not limited to reasonable attorneys’ fees).”²⁰³ However, with attorneys’ fees included in Article XXI, the Davis contract could have met the requisite specificity to impose attorneys’ fees on the losing party.²⁰⁴ Therefore, the court likely provided a sufficient and subtle distinction between the recovery and attorneys’ fees and

197. *Id.* at 341.

198. *Martin & Martin, Inc. v. Bradley Enterprises, Inc.*, 504 S.E.2d 849, 851 (Va. 1998) (stating that wherever ambiguity arises, it must be interpreted against the drafter of the contract).

199. *James G. Davis Constr. Corp.*, 147 A.3d at 336.

200. 952 A.2d 275, 285 (Md. 2008) (presenting the top 400 contractors, by revenue, in the United States).

201. *Id.* (“Where the contract provides no express provision for recovering attorney’s fees in a first-party action establishing the right to indemnity, however, we decline to extend this exception to the American rule, which generally does not allow for prevailing parties to recover attorney’s fees.”).

202. *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. L.P.*, 164 A.3d 978, 986 n.6 (Md. 2017) (citing *James G. Davis Constr. Corp.*, 147 A.3d at 340–41).

203. *James G. Davis Constr. Corp.*, 147 A.3d at 336.

204. *See id.* at 336; *Zissu v. Bear*, 805 F.2d 75, 79 (2d Cir. 1986) (providing an example of a case that did not meet the necessary level of scrutiny).

the American Rule by including the “any and all” language.²⁰⁵

As the court provided in a footnote in *Bainbridge St. Elmo Bethesda Apartments, LLC*, a subtle distinction arose:

[G]iven the *language and structure* of the clause and what it covers specifically in terms of damages, some of them, not all of them, are only first-party damages. It would make no sense . . . in the same provision to say, we’re going to give your first-party type damages, but this clause doesn’t apply.²⁰⁶

If allowing the recovery of first-party fees was allowed without being specifically stated within the contract, courts might as well adopt the British Rule and award the prevailing party with any incurred attorneys’ fees.²⁰⁷ *James G. Davis Construction Corp., Hensel Phelps Construction Co., and Bainbridge St. Elmo Bethesda Apartments, LLC* illustrate that even though many parties contract out of the American Rule, the default is moving closer and closer to the British Rule, allowing parties to recover attorneys’ fees without specific contract provisions.²⁰⁸

D. *What if there was only one Indemnity Provision?*

In *Hensel Phelps Construction Co.*, the D.C. Court of Appeals cited to the holding in *James G. Davis Construction Corp.* to demonstrate that “any and all” language alone may not allow for first-party recovery, stating that:

[R]eading an indemnification clause covering “any and all costs and expenses to reach first-party claims by looking to a second indemnification provision clause protecting only against ‘loss or losses directly connected with the performance of the Construction Contract’ and reasoning the parties purposely chose a broader formulation for the clause at issue” and therefore no ambiguity exists because of the parties deliberately used the language in the contract.²⁰⁹

However, in *Bainbridge St. Elmo Bethesda Apartments, LLC*, the Maryland court, disagreed with *James G. Davis Construction Corp.*’s holding,²¹⁰

205. See *James G. Davis Constr. Corp.*, 147 A.3d at 336.

206. *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 982 n.3 (relying on the list of claims in the contract that included claims that could only be first-party claims, e.g. rent loss and because one first-party claim is included in the list, the indemnity provision intended to include the recovery of attorneys’ fees in first-party claims).

207. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994); see also Eisenberg & Miller, *supra* note 4, at 327 (stating that the British Rule may encourage lawsuits by optimistic parties).

208. See *Fogerty*, 510 U.S. at 533; Eisenberg & Miller, *supra* note 4, at 327.

209. *Hensel Phelps Constr. Co. v. Cooper Carry Inc.*, 861 F.3d 267, 275 (D.C. Cir. 2017).

210. See *James G. Davis Constr. Corp.*, 147 A.3d at 340 (stating that Maryland law governs the contract).

“conclude[d] that the plain language of an indemnification provision containing an express reference to ‘attorney’s fees’ and an ‘unqualified reference to ‘any breach,’ allowed for first-party fee-shifting.”²¹¹ This suggests that two jurisdictions who generally look to each other for guidance have different interpretations of the holding in *James G. Davis Construction Corp.*; D.C. would likely not allow for the recovery of first-party claims with “any and all” language in the contract, whereas Maryland would likely allow for the recovery of first-party claims.²¹² D.C., the jurisdiction in which the case was decided, limited the *James G. Davis Construction Corp.* holding to “all,” which only includes first-party recovery when there is another provision that specifically refers to third-party recovery.²¹³ However, Maryland, in interpreting a D.C. case that interpreted Maryland law, suggested that the holding is actually more broad than D.C. wishes to acknowledge and the “any and all” language, in reference to attorneys’ fees, includes the recovery by first-parties, regardless of a second provision explicitly allowing recovery by third-parties.²¹⁴

Without the court finding that, as a matter of law, there was ambiguity in the contract, the plain meaning must be interpreted and the question must be presented to the fact-finder.²¹⁵ Therefore, at the outset of litigation, ambiguity within the contract and the intent of the parties must be determined for a court to provide an accurate ruling on the contract terms.²¹⁶ Without ambiguity, the plain language will be read and interpreted.

IV. HOW TO DRAFT AN INDEMNITY PROVISION

If *James G. Davis Construction Corp.* sets the new standard, it is necessary to reevaluate fee-shifting provisions and contracts generally. Fee-shifting provisions are not the only essential elements of receiving or paying attorneys’ fees if the lawsuit is won or lost, respectfully; but it is necessary to read the entire contract to determine if there is any possible plain language

211. *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 486 n.6.

212. Barbara Bintliff, *Mandatory v. Persuasive Cases*, PERSPS.: TEACHING LEGAL RES. AND WRITING, Winter 2001, <https://info.legalsolutions.thomsonreuters.com/pdf/perspec/2001-winter/winter-2001-7.pdf> (last visited Apr. 13, 2019) (stating that “because demographic, geographic, or historic similarities may have led to the development of similar legal doctrines among neighboring states.”).

213. *Hensel Phelps Constr. Co.*, 861 F.3d at 275.

214. *Bainbridge St. Elmo Bethesda Apartments, LLC*, 164 A.3d at 989.

215. *Washington Props, Inc. v. Chin, Inc.*, 760 A.2d 546, 548 (D.C. 2000) (stating that whether a contract is ambiguous is a question and the determination is outside that of a jury).

216. *Merriam v. United States*, 107 U.S. 437, 444 (1883) (stating that the intent of the parties is only necessary where ambiguity exists).

that could give the court any reason to infer that first-party claims are included in the agreement.²¹⁷ A contract should not have frivolous language; an irrelevant provision can raise questions or change the meaning of another contract provision.²¹⁸ Therefore, it is necessary to view the contract as a whole, use consistent language, and determine what the client wants at the outset.²¹⁹

Indemnity provisions can act as a savior on one hand, but a death sentence on the other. Once the client is aware of the problems that may arise with including or not including first-party indemnity that includes attorneys' fees, it is necessary to move forward with caution.²²⁰ If the client wishes to include first-party recovery of attorneys' fees, it is necessary to make sure that they are explicitly called for or that attorneys' fees are referenced with respect to "any and all" claims.²²¹

Additionally, it would be prudent to explicitly state that a provision includes, or does not include, first-party claims. When this is not possible, one must look for language in the contract that may give the court reason to include first-party claims. At this point, it is unclear whether courts are trying to expand the exceptions under the American Rule, but it appears they are. If part of an indemnity provision may only apply to first-party claims, it should be removed or further specified to only include third-party claims. If there is more than one provision that applies to indemnification, it must be clear that first-party claims are not included. This can be achieved by intentionally leaving out first-party claims (including breach of contract, which can only be a first-party claim). Though the American Rule still applies in Maryland and D.C., courts are becoming more likely to increase their definitions of 'expressed' by reading "any and all" language to include first-party claims.

Indemnity provisions are in many contracts and the intent of the parties should be understood by the plain reading of a contract whenever possible because indemnity provisions could determine whether a lawsuit is brought

217. *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 283 (Md. 2008) (presenting that a court must look at the contract in its entirety, therefore in determining how a court will look at a contract, attorneys must look to the entire contract document).

218. *See id.* at 283 (stating that a court will read the contract in its entirety to determine its meaning); *Sagner v. Glenangus Farms, Inc.*, 198 A.2d 277, 286 (Md. 1964) (stating that the court will not read out any part of the contract).

219. *Nova Research, Inc.*, 952 A.2d at 283.

220. MILLER, *supra* note 41.

221. *James G. Davis Constr. Corp. v. HRGM Corp.*, 147 A.3d 332, 336 (D.C. 2016) (holding that any and all language in reference to claims and attorneys' fees will hold a losing first-party responsible for reasonable attorneys' fees).

or whether a settlement is the more practical business decision.²²² However, what is rarely understood is that the decision is made far before the time to file suit and, therefore, the client must be aware of the seriousness of the decision to include first- or third-party indemnity provisions. Once the client has determined which path they wish to take, the safest option is to ensure that the plain language of the contract supports the client's intent.

V. CONCLUSION

For the aforementioned reasons, the D.C. Court of Appeals likely expanded the jurisprudence regarding first-party recovery of attorneys' fees. However, currently this is the new standard and if the holding is not further limited, it is necessary to increase the specificity of indemnity provisions in contracts. Without specificity in contract terms that are consistent throughout the entire contract, one term can alter the intent of the parties and the plain language interpretation of the contract.

The construction industry is a relatively low percentage profit industry and, therefore, the allocation of risk is important to control companies' bottom lines. In many cases, especially large construction project claims, attorneys' fees may be incredibly high. HRGM acquired over \$800,000 in fees and costs and the company was only responsible for twenty percent of a \$53 million project, roughly 10.6 percent of the revenue generated by the contract.²²³ Therefore, the importance of fee-shifting provisions in contracts cannot be overlooked.

222. See Eisenberg & Miller, *supra* note 4, at 333–34.

223. *Id.*